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In the Supreme Court of the United States

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October Term, 1998

DR. CARL BERNOFSKY
Petitioner,

v.

TULANE UNIVERSITY SCHOOL OF MEDICINE
(ADMINISTRATORS OF THE TULANE EDUCATIONAL FUND),
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Petition for Writ of Certiorari

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STATEMENT OF QUESTIONS PRESENTED

1. Does 42 U.S.C. Section 1981(b) provide employees with actionable claims for racial harassment, retaliation, and discharge for conduct arising after November 21, 1991, the effective date of the Act?

2. Does "adverse employment action" under 42 U.S.C. Section 1981 or 29 U.S.C. Section 623(d) limit employees in retaliation claims to "ultimate employment decisions"?

3. Does 42 U.S.C. 1981(b) and 29 U.S.C. 623(d) protection against retaliation extend only to employees' complaints about discrimination concerning promotions when they are either clearly entitled to such promotion, or can prove that they were not promoted for unlawful discriminatory reasons?

PARTIES

The party to this petition is Dr. Carl Bernofsky.

The parties in the courts below were Dr. Carl Bernofsky and The Administrators of the Tulane University educational Fund, (Tulane University Medical School).

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PRIOR OPINIONS

The opinion sought to be reviewed is unpublished. (App. pp. A2). The District Court opinion, Bernofsky v. Tulane University Medical School, is published at 962 F.Supp. 895 (E.D.La. 1997). (App. pp. A5).

JURISDICTION

Petitioner seeks this Court's review of the judgment entered on January 8, 1998 by the United States Circuit Court of Appeals for the Fifth Circuit, by a Petition for Writ of Certiorari pursuant to the jurisdiction conferred by 28 U.S.C. Section 1254(1). This Petition is timely filed because it was mailed within ninety days of February 5, 1998, the date a motion for rehearing was denied in the court below. Rules 13.3 and 29.2.

Jurisdictional basis for the Fifth Circuit is 28 U.S.C. 1291, and for the District Court is 28 U.S.C. 1331 and 1337.

STATUTES INVOLVED

42 U.S.C. Section 1981 in pertinent part provides:

All persons within the juris-

> diction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens . . .

42 U.S.C. Section 1981(b) in pertinent part provides:

> For purposes of this section, the term 'make and enforce contracts' includes making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

29 U.S.C. 623(d) in pertinent part provides:

> It shall be unlawful for an employer to discriminate against any of his employees or applicants for employment . . . because such individual . . . has opposed any practice made unlawful by this section, or because such individual . . . has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this chapter.

STATEMENT OF THE CASE
PROCEDURAL HISTORY

On January 31, 1995 Bernofsky filed suit alleging discrimination under 42 U.S.C. Section 1981 and joined various state law claims. The complaint asserted that Bernofsky was a professor at Tulane University Medical School where he had been a faculty member for 20 years and that a new Departmental Chairman, who arrived in November 1991, had harassed him, interfered with his staff, hindered his performance causing him to lose grant funding, and threatened termination. The complaint further alleged that this action was based on the fact that Bernofsky was Jewish and that all three older Jewish faculty members in the Department of Biochemistry were being discriminated against on the basis of their Jewish race by the new Chairman, who was of Lebanese descent.

A First Amended Complaint was filed on February 27,1995 adding an age discrimination claim under state law.

On April 10, 1995, Bernofsky's Motion for a Preliminary Injunction was denied. The trial date of January 22, 1996 was continued to July 8, 1996 due to Bernofsky's diagnosis of cancer.

A Second Amended Complaint was filed on November 21, 1995 adding an ADEA claim and a claim for conversion of laboratory equipment and materials.

Tulane filed a Motion for Summary Judgment on May 14, 1996, and a Reply Memorandum on May 31, 1996. In each of these motions, Tulane treated Bernofsky's claims based on race and age completely separately. Bernofsky filed an Opposition Memorandum to Summary Judgment on May 21, 1996, and a Reply Memorandum opposing summary judgment on June 5, 1996.

In response to issues raised by the District Court, Bernofsky filed a Supplemental Memorandum opposing summary judgment on July 1, 1996 and a Memorandum in Response to Court's Request and a letter setting forth each of his claims also in response to the District Court's directive. Tulane delivered a Pre-trial Memorandum to Bernofsky on July 1, 1996. He responded on July 2, 1996. A status conference was held July 5, 1996. On that date, the District Court informed counsel that Tulane's motion for summary judgment would be denied and that the trial would commence as scheduled on July 8, 1996. Due to Tulane's complaints concerning the Exhibit Books assembled by Bernofsky, the parties mutually agreed to continue the trial until the next available date. Thereafter, summary judgment was granted on April 15, 1997. A final judgment was rendered on April 21, 1997.

The District Court found that Section 1981 did not extend to any conduct by the employer after the contractual relationship has begun and that harassment claims and retaliation claims were not actionable under Section 1981

citing Patterson v. McLean Credit Union, 491 U.S. 164, 109 S.Ct. 2363, 105 L.Ed.2d 132 (1989) and Carter v. South Central Bell, 912 F.2d 832 (5th Cir. 1990), cert. denied 501 U.S. 1260 (1991). Additionally, the District Court found Bernofsky had no retaliation claims under Section 1981 or the ADEA because the alleged discriminatory conduct did not amount to an "ultimate employment decision" which was the standard used for determining whether there has been "adverse employment action". The District Court also determined that the retaliation claims suffered from the absence of "protected activity" since Bernofsky filed a charge with the EEOC after suit was filed and that his prior complaints to his Chairman were of no consequence since he had not proved either he was entitled to tenure or that tenure had been denied due to improper racial or age considerations. Finally, with respect to Bernofsky's retaliation claims, the District Court found they lacked causation but offered no explanation. Bernofsky v. Tulane University Medical School, 962 F.Supp. 895 (E.D.La. 1997). (App. pp. A2). Bernofsky filed a timely Notice of Appeal on May 9, 1997. In an unpublished opinion, the Fifth Circuit affirmed the District Court for "substantially" the same reasons. (App. pp. A15, A20-A21). The Fifth Circuit denied Bernofsky's motion for a rehearing on February 5, 1998.

FACTS

Dr. Carl Bernofsky ("Bernofsky"), a research biochemist, was employed at Tulane University Medical School for nearly 20 years. Before coming to Tulane, Bernofsky was employed at the Mayo Medical School and Clinic. At Tulane, he held the rank of Research Professor. Shortly after his arrival at Tulane, his Department Chairman, Dr. Rune Stjernholm ("Stjernholm") promised Bernofsky that he would become the next tenured member of the Department. Until he was replaced by the new Chairman, Stjernholm continued to promise Bernofsky that he would become tenured.

In November, 1991, the Chairmanship of the Biochemistry Department at Tulane changed. Dr. Jim Karam ("Karam") became the new Chairman. Before his arrival, Karam had written a letter to the Dean in which he proposed "to expedite faculty turnover." Immediately thereafter, Karam began to take adverse actions against the three senior Jewish faculty members. The targeted faculty were relieved of their teaching duties, committee assignments, and laboratory space.

One professor with a history of substance abuse was retired. The remainder of the "expedited turnovers" came solely from the ranks of the three senior Jewish professors. Dr. William Cohen ("Cohen") accepted an early retirement package, Bernofsky was fired, and Dr. Melanie Ehrlich ("Ehrlich") was ousted by

being physically removed from within the Department despite the fact that she was a tenured member of that Department.

Prior to Karam's arrival, Ehrlich consistently had the first or second highest grant funding, and Bernofsky had the third highest grant funding in the Department. After Karam arrived, Bernofsky and Ehrlich were subjected to a well-documented program of interference and harassment, causing them to lose grant funding and laboratory personnel.

At his initial meeting with Karam, Bernofsky requested that his name be submitted to the appropriate committee for consideration of his credentials for tenure. After Bernofsky requested the long promised tenure, in effect a request for promotion, he began to be harassed, his research efforts were hampered until he lost funding, he was evaluated by a method that did not comply with the requirements set out by the Dean, and he was terminated, despite the fact that he secured a new $250,000 Air Force grant to support his research program before the deadline established by Tulane for obtaining new grant funds.

The most egregious instance of Karam's obstruction and interference with Bernofsky's work performance involves an electron paramagnetic resonance spectrometer ("EPR") needed in his research. Bernofsky prepared a proposal to the Louisiana State Board of

Regents ("Regents") for funds to purchase an EPR for use at Tulane for "free radical" research. The Regents awarded Bernofsky's proposal $250,000 for purchase of the EPR.

Karam's appointment as Chairman of the Biochemistry Department coincided with the Regents' award. Karam delayed the project for nearly eighteen months. Initially, Karam's interference caused the EPR to remain on a loading dock in its crates for about a year. During that period, Bernofsky was repeatedly forced to request additional time from the Regents. Installation went forward only after the Regents threatened to rescind the award. Once the EPR was finally installed, Karam effected Bernofsky's removal as Principal Investigator and transferred authority over the EPR to another department.

This eighteen month delay was devastating for Bernofsky because it overlapped with an NSF grant awarded to him for the express purpose of "free radical" research, which required use of the EPR. The NSF grant in the amount of $243,000 was not renewed due to lack of progress on "free radical" research.[1] The

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[1] Throughout Bernofsky's career as a Research Professor, from 1975 through 1994, he received grant support from the National Science Foundation ("NSF"), the National Institutes of Health ("NIH"), and other funding sources. During these years, the NSF and NIH grants often overlapped, and with the

eighteen month delay also coincided with the employment of a highly-trained EPR researcher whose salary was paid by Bernofsky's grant funds. When Bernofsky was prevented from using the EPR machine, the delay insured that his NSF grant, the backbone of his grant support at that time, would not be renewed.

Karam also interfered with Bernofsky's staff. Due to nonrenewal of the NSF grant, Bernofsky temporarily had no funds to pay his research associates. Despite this, they agreed to continue working at a minimal salary while Bernofsky sought new funding. Karam refused to permit these researchers to work at salaries that Bernofsky would pay from his personal funds. This refusal hindered Bernofsky's ability to complete and publish the results of his most recent research efforts.

Ehrlich, another senior Jewish professor, filed grievances against Karam who had called her laboratories "ratholes." Karam, in front of his staff, told Ehrlich that she should "leave the dept, leave the school," and that he would "kick her out of here". He subsequently had her removed from the laboratories long assigned to her in the Biochemistry Department.

Cohen, also a senior Jewish faculty member, had his laboratory, teaching responsi-

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exception of one year, there was never a year when he lacked support from one or another of these major funding sources.

bilities, and committee assignments taken from him. Thereafter, he reluctantly accepted early retirement.

Karam ignored environmental problems affecting Bernofsky and Ehrlich. Bernofsky complained about blood, animal hair and tissue, and chemicals raining down into his laboratory from the floor above. Rather than attempting to remedy the environmental problem, Karam sought to have Bernofsky reprimanded at grievance proceedings. In Ehrlich's case, noxious discharges were ducted from Karam's newly renovated laboratory into her office. When Ehrlich complained, no corrective action was taken by Karam until she wrote to Environmental Health and Safety. Then Karam stalled the requisition to pay for the new duct work necessary to remedy the problem.

In May, 1994, Karam handpicked a "Faculty Review Committee" to examine Bernofsky's performance. The review of Bernofsky did not follow University procedures. According to these procedures, a faculty member is entitled to choose up to two members of the Review Committee, submit three letters from peers at other institutions, challenge the findings of the Review Committee, and have the Personnel and Honors Committee examine and comment on the final report. None of these procedures were allowed.

According to Tulane, the "objective basis" proving Bernofsky's disqualification is derived

from "the specially appointed peer review committee, established by Karam to review Bernofsky's performance in the Department of Biochemistry in order to determine if he was qualified for the position of Research Professor."

The Review Committee was composed of Drs. Rune Stjernholm, Richard Steele ("Steele"), and Yu-Teh Li ("Y-T Li"). To evaluate Bernofsky's work, the Committee relied upon Steele, who admitted that he had not read Bernofsky's work under review. Steele stated, "I'm not sure at that time I went back and read any papers". Stjernholm stated, "I don't know what Bernofsky has done the last two years, because I haven't followed it". Y-T Li, in response to, "So you relied primarily on Steele?", admitted, "I think so".

Aside from **not** having any expertise in Bernofsky's field, Y-T Li consistently rejected interactions with both Ehrlich and Bernofsky. Karam was aware of this, but nonetheless selected him to review Bernofsky's work. Y-T Li wrote to Karam that he hoped for a "long term solution" to the problem of Ehrlich. When Y-T Li was asked whether he liked Bernofsky he replied, "No comment".

Steele referred to Tulane as "Jewlane" during his deposition, further stating the school was called "Jewlane" because "so many Jewish people come down here to go -- to teach, and why they do that, I don't know." He

demanded that the evaluation state Bernofsky's work was not competitive. He insisted on this harsh language even though he admitted that he had not bothered to read the publications that Bernofsky had submitted to the Review Committee. Tulane terminated Bernofsky based on the Review Committee's evaluation and Karam's recommendation. World-class experts later attested to Bernofsky's expertise and professional reputation in the "free-radical" field.

According to Tulane, Bernofsky was not contributing any support whatsoever to the Biochemistry Department, was not an "asset in the business sense" to the Department, had not been an asset in recent years, and his inability to generate funding for his research was a direct reflection on the quality of his research and publication.

After review of Tulane financial documents for the Biochemistry Department, Dr. Stuart Wood, an economist stated:

> "Bernofsky was, in business terms, an "asset" of the Biochemistry Department and the Tulane School of Medicine. That is, evaluated on a business basis, according to the principles of accounting, Bernofsky brought in more benefits than costs to the Biochemistry Department . . . ."

Tulane retained another Research Professor, Dr. S-C Li ("S-C Li"). She is not Jewish and has lesser qualifications than Bernofsky. Tulane admitted that S-C Li never

generated any grant support for her own salary, nor was she ever required to do so by Tulane. S-C Li was never assigned any teaching duties of her own, nor did she ever assume teaching obligations of her own, unlike Bernofsky who assumed his own teaching responsibilities for sixteen years and never refused to teach.

A less qualified research professor in the Department, Dr. Jen-Sie Tou ("Tou"), was converted from a research position to a tenured position after having been employed at Tulane for 18 years. Prior to her conversion, Tou was on tenure track for only one year from July 1, 1979 to July 1, 1980 and had special appointments both before and nine years after that period. Her conversion occurred three years after the publication of the 1986 Faculty Handbook, which Tulane asserts prohibited Bernofsky from being converted. Both Bernofsky and Tou received similar annual appointment letters. Tou's receipt of these yearly appointment letters preceding her conversion did not prohibit her from receiving automatic tenure.

Bernofsky was 61 years of age when he was terminated. When Bernofsky asked Karam to be considered for tenure, Karam told him that he would not be promoted, i.e. officially tenured, because of his age. Karam stated, "a guy of [your] age who has been here so long already has *de facto* tenure." Karam, an individual with authority over the employment decision at issue, made the remark on three occasions, when

Bernofsky sought to have his credentials reviewed so that he might be promoted to a tenured position. At the time Bernofsky requested that Karam submit his credentials for tenure consideration, there were positions available within the Department. Stjernholm testified that openings were available at the time his Chairmanship was ending, but he was not permitted to fill them because the administration wanted them to remain open for Karam to fill with young faculty. Bernofsky was seeking a promotion that had long been promised. When Bernofsky persisted in his request, alleged problems with his performance began to be documented, he was harassed, and his staff and research program were dissolved.

Stjernholm, a tenured professor who was not forced to leave, admitted that he was harassed because he did not retire as Tulane wished him to do when he turned 65. The young faculty members who were hired by Karam were each provided approximately $135,000 in funds with which to set up his or her own laboratory. Bernofsky, who along with several other senior faculty helped Karam obtain funds from the NSF for renovation purposes, received none of those funds for his own program despite repeated requests for a pro rata allocation of those funds.

In April 1995, Bernofsky was discharged and Tulane confiscated his laboratory equipment.

ARGUMENT

1. Does 42 U.S.C. Section 1981(b) provide employees with actionable claims for racial harassment, interference with job performance, retaliation, and discharge for conduct arising after November 21, 1991, the effective date of the Act?

The Circuit Courts of Appeal Are Split In Their Interpretation Of This Important Statute.

Section 1981(b) of the Civil Rights Act of 1991 ("the Act"), 42 U.S.C. Section 1981(b), specifically provides that, "[f]or purposes of this section, the term 'make and enforce contracts' includes the making, performance, modification, and termination of contracts and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship."

In the Civil Rights Act of 1991, enacted November 21, 1991, Congress by adding Section 1981(b) statutorily reversed this Court's decision in Patterson v. McLean Credit Union, 491 U.S. 164, 109 S.Ct. 2363, 105 L.Ed.2d 132 (1989). In Patterson, this Court held that a Section 1981 claim will lie only if the discriminatory conduct complained of resulted in a "new and distinct" contractual relationship between the employer and the employee.

Relying on Patterson, the Fifth Circuit, in Carter v. South Central Bell, 912 F.2d 832 (5th Cir. 1990), cert. denied 501 U.S. 1260

(1991), held that Section 1981 no longer covers claims of retaliatory discharge and that "all suits for discriminatory dismissal must be brought under Title VII." Id. at 841.

The Fifth Circuit, however, has not definitively addressed whether retaliation claims may now be maintained under Section 1981, as amended by the Civil Rights Act of 1991. Steverson v. Goldstein, 24 F.3d 666, 670 n. 7 (5th Cir. 1994), cert denied 513 U.S. 1081, 115 S.Ct. 731, 130 L.Ed.2d 634 (1995). Without expressly discussing the issue, in Steverson, the court affirmed a jury verdict for retaliatory discharge under 42 U.S.C. Sections 1981 and 1983. Id. Prior to Patterson, it was clear that retaliation claims were actionable under Section 1981. Goff v. Continental Oil Co., 678 F.2d 593, 597-99 (5th Cir. 1982).

Other circuits and district courts that have interpreted Section 1981(b) have indicated that retaliation is now actionable under Section 1981. Evans v. Kansas City, Mo. Sch. Dist., 65 F.3d 98, 101 (8th Cir. 1995), cert. denied 517 U.S. 1104, 116 S.Ct. 1319, 134 L.Ed.2d 472 (1996); Butts v. City of New York Dep't of Hous. Preservation & Dev., 990 F.2d 1397, 1404 (2d Cir. 1993); Cabiness v. YKK (USA), Inc., 859 F.Supp. 582, 588 (M.D.Ga. 1994) aff'd, 98 F.3d 1354 (11th Cir. 1996).

> 'Although Section 1981(b) does not directly state that retaliation claims are actionable under Section 1981, the legislative purpose of Sec-

tion 1981(b) clearly evinces that Congress intended such claims to be actionable under Section 1981.' Patterson v. Augat Wiring Sys., Inc., 944 F.Supp. 1509, 1519 (M.D.Ala. Oct 28, 1996). . . . [T]he legislative history reflects that Congress intended to make retaliation claims actionable under Section 1981. Id. The House Committee on Education and Labor, the committee to which the bill to amend the Civil Rights Act of 1964 was assigned, stated:

> Section 210 would overrule Patterson by adding at the conclusion of section 1981 a new subsection (b). . . . The Committee intends this provision to bar all race discrimination in contractual relations. The list set forth in subsection (b) is intended to be illustrative rather than exhaustive. In the context of employment discrimination, for example, this would include, but not be limited to, claims of harassment, discharge, demotion, promotion, transfer, retaliation, and hiring.

Id. at 1519-20 (quoting H.R.Rep. No. 40(I), 102d Cong., 1st Sess. 92 (1981), reprinted in U.S.C.C.A.N. 549, 630); Adams v. City of Chicago, 865 F.Supp. 445, 446-47 (N.D.Ill. 1994).

Thomas v. Exxon, U.S.A., 943 F.Supp. 751, 762 (S.D.Tex. 1996) aff'd, 122 F.3d 1067 (5th Cir. 1997) (unpublished opinion). Thomas did not challenge on appeal the grant of summary judgment in favor of Exxon on her Section 1981 retaliation claim.

In the decision below, the District Court stated that "[Section] 1981 does not recognize claims for racial harassment, . . . [w]ith regard to . . . [the] discriminatory discharge claim, Section 1981 does not extend to discriminatory discharge claims or retaliatory discharge claims." (App. pp. A15-A16).

The Fifth Circuit by affirming the District Court's decision which concerned alleged discrimination occurring after November 21, 1991, continues to permit Patterson's restrictions on employees' harassment and retaliation claims to bar such claims despite the fact that Congress legislatively reversed Patterson.

By enacting the Act and adding section 1981(b), Congress expressed its discontent with the jurisprudential limitations developed in Patterson which severely limited claims which could be brought by employees under Section 1981. The judgment below ignores Congress' express purpose in enacting Section 1981(b) which is "to expand the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination."

To further the purposes of the Act, Section 1981(b) must be construed to cover claims of harassment and claims of retaliation that occurred after November 21, 1991, the date of enactment. It is in the public interest for this Court to resolve any split to provide uniformity of construction and application of this important statute.

2. Does "adverse employment action" under 42 U.S.C. Section 1981 or 29 U.S.C. Section 623(d) limit employees in retaliation claims to "ultimate employment decisions"?

The Circuit Courts of Appeal Are Split In Their Interpretation Of This Important Statute.

Nothing in the language of either 42 U.S.C. Section 1981 or 29 U.S.C. Section 623(d) suggests that Congress intended to limit retaliation claims to damage caused by the employer's "ultimate employment decisions" such as, hiring, granting leave, discharging, promoting, and compensating.

In Mattern v. Eastman Kodak Co., 104 F.3d 702 (5th Cir. 1997), cert. denied __ U.S. __, 118 S.Ct. 336, 139 L.Ed.2d 260 (1997), the Fifth Circuit held that the definition of "adverse employment action" for retaliation claims under Title VII does not include action that has a "mere tangential effect on a possible future ultimate employment decision" such as disciplinary action, reprimand, or even poor performance, or "anything which might jeopardize employment in the future." Id. at 708.

The Fifth Circuit extended the Mattern limitation on retaliation claims asserted under Title VII to a retaliation claim asserted under Section 1981 and the ADEA in the decision below. The District Court stated that, even if there was no procedural bar under Patterson v. McLean, supra, then the conduct complained of

failed to carry with it the degree of consequence necessary to meet the standard of an "ultimate employment decision". (App. pp. A16, A20).

However, as the dissenting judge in Mattern, at 715, persuasively argued, this limitation on a retaliation claim brought under Title VII "is contrary to Congressional intent and departs from settled precedents . . . . Moreover, it strikes a grievous blow to the entire enforcement mechanism of Title VII."

> There can be no doubt about the purpose of Section 704(a). In unmistakable language it is to protect the employee who utilizes the tools provided by Congress to protect his rights. The Act will be frustrated if the employer may unilaterally determine the truth or falsity of charges and take independent action.

Id. quoting Pettaway v. Am. Cast Iron Pipe Company, 411 F.2d 998, 1005 (5th Cir. 1969).

Likewise, to extend this judge-made limitation to Section 1981 claims of retaliation in the employment context runs counter to the express purpose of Congress in enacting Section 1981(b) which was to expand the protections available to victims of discrimination in the workplace. See Civil Rights Act of 1991, Pub. L. No. 102-166, Section 3(1) and (4), 105 Stat. 1071 (1991). Also, nothing in the ADEA suggests that such a judge-made limitation on a claim under Section 623(d) is appropriate.

In Mattern, the Fifth Circuit interpreted

dicta in Page v. Bolger, 645 F.2d 227 (4th Cir. 1981) and Dollis v. Rubin, 77 F.3d 777 (5th Cir. 1995) to conclude that to recover for retaliation under Section 704(a) of Title VII, an employee must prove that he was discriminated against by the employer in an "ultimate employment decision" such as "hiring, granting leave, discharging, promoting, and compensating." According to the dissenting judge, nothing in the statute or in Page justifies such an interpretation. Mattern at 716.

In Page v. Bolger, a postal employee, who was twice denied promotions, brought suit against the Postmaster General claiming racial discrimination. The district court determined Page had not established his claim of discrimination. The Fourth Circuit affirmed. The court in Page commented on an argument put forth by the plaintiff seeking to modify the McDonnell Douglas formula under which a claimant could establish a prima facie case. Under the proposed modification, the plaintiff would establish a prima facie case by showing that he belonged to a minority; he qualified for the position; he was denied a promotion because of an evaluation by a review committee consisting only of white males. At this point, under the proposed modification, the employer would be required to articulate some nondiscriminatory reason for the absence of a minority member on the review committee, and, if this was done, the pretext inquiry would focus on this reason,

rather than the articulated reason for denying the promotion. Mattern at 716.

The majority of the Fourth Circuit, en banc, rejected plaintiff's proposed modification stating in dictum:

> The proper object of inquiry in a claim of disparate treatment under Section 717 is whether there has been "discrimination" in respect of "personnel actions affecting (covered employees or applicants for employment . . . ." 42 U.S.C. Section 2000e-16(a) (emphasis added). Disparate treatment theory as it has emerged in application of this and comparable provisions of Title VII, most notably Section 703(a)(1), 42 U.S.C. Section 2000e-2(a)(1), has consistently focused on the question whether there has been discrimination in what could be characterized as ultimate employment decisions such as hiring, granting leave, discharging, promoting, and compensating. This is the general level of decision we think contemplated by the term "personnel actions" in Section 717. . . . By this we suggest no general test for defining those "ultimate employment decisions" which alone should be held directly covered by Section 717 and comparable antidiscrimination provisions of Title VII. Among the myriad of decisions constantly being taken at all levels and with all degrees of significance in the general employment contexts covered by Title VII there are certainly others than those we have so far specifically identified that may be considered for example, entry into training

> programs. By the same token, . . . there are many interlocutory or mediate decisions having no immediate effect upon employment conditions which were not intended to fall within the direct proscriptions of Section 717 and comparable provisions of Title VII. We hold here merely that among the latter are mediate decisions such as those concerning composition of the review committees in the instant case that are simply steps in a process for making such obvious end-decisions as those to hire, to promote, etc.

Mattern at 716-17 (citing Page, 645 F.2d at 233).

In subsequent cases, courts have disagreed with Page's restricted definition of "adverse employment action" and have limited its holding to Federal Government employment cases. Similarly, in Hayes v. Shalala, 902 F.Supp. 259, 266 (D.D.C.Cir. 1995), the court noted that the D.C. Circuit had not directly addressed the limitation set forth in Page, but that it had adopted a broader interpretation of actionable personnel actions than that of the Fourth Circuit. (Citing Palmer v. Shultz, 815 F.2d 84 (D.C.Cir. 1987)). The Hayes court concluded that the plaintiff-employee must be permitted to argue that the totality of actions taken by his employer collectively created a harassing and retaliatory environment, even if individual actions may not have left a permanent paper trail or may even have been 'mediate' employment decisions as identified by the Fourth

Circuit in Page.

In Howze v. Virginia Polytechnic, 901 F.Supp. 1091, 1097 (W.D.Va. 1995), the court noted that Page "was not a retaliation case . . . Second in defining the term 'personnel actions' . . . [t]here is no indication that the Fourth Circuit intended this definition to apply to the retaliation provision in section 2000e-3(a)." See Mattern at 717-18.

The other case relied on by the Fifth Circuit in arriving at its limitation on a retaliation claim was Dollis, which was not a retaliation case. See Mattern at 718.

This limitation set on retaliation claims under Title VII which was extended in the decision below both to a claim of retaliation under Section 1981 and a claim of retaliation under the ADEA shows that there is a split in the circuits on this important issue. As the dissenting judge pointed out in Mattern, ". . . [there is no] justification for interpreting Title VII to afford less protection against retaliatory discrimination than against sexual, racial, or other types of forbidden discrimination . . . to effectuate the purposes of Congress, Section 704(A) affords broad protection against retaliation for those who participate in the process of vindicating civil rights through Title VII. (Citations omitted.) Mattern at 719.

Mattern precludes consideration of all the circumstances in retaliation cases and thus

drastically weakens Section 704(a)'s protection against retaliation. The construction given to Section 704(a) by Mattern below undercuts the enforcement of Title VII. Likewise, applying Mattern's restricted definition of "adverse employment action" to a retaliation claim asserted under Section 1981 or the ADEA weakens the protection against retaliation provided by these important statutes and weakens their enforcement. Nothing in the language of the Civil Rights Act of 1991 exists to permit or justify a similar restriction to be engrafted on the retaliation protection added by Section 1981(b). Moreover, nothing in the language of the ADEA justifies this same restriction on the anti-retaliation provision at Section 623(d).

In addition to the limitation placed on a retaliation claim by the holding in Mattern, the Fifth Circuit has adopted a more stringent analysis of retaliation claims, requiring a plaintiff to demonstrate that the protected conduct was a "but for" cause of the adverse employment action. McDaniel v. Temple Indep. School Dist., 770 F.2d 1340, 1346 (5th Cir. 1985).

The Eleventh Circuit's less stringent approach requires only that the protected activity and adverse action are not wholly unrelated. See Simmons v. Camden County Bd. of Educ., 757 F.2d 1187, 1189 (11th Cir.), cert. denied 474 U.S. 981, 106 S.Ct. 385, 88 L.Ed.2d 338 (1985). See Donnellon v. Fruehauf Corp., 794 F.2d 598, 601 (11th Cir. 1986).

Similarly, the District of Columbia Circuit allows a retaliation claim where the employer has knowledge of the protected activity and the adverse personnel action took place shortly after that activity. Mitchell v. Baldridge, 759 F.2d 80, 86 (D.C.Cir. 1985).

To avoid undercutting enforcement of these important anti-retaliation protections, Section 704(a), Section 1981(b), and Section 623(d) must be construed to cover all circumstances of adverse employment action rather than only those meeting the strict definition of "ultimate employment decision." It is in the public interest for this Court to resolve any split among the circuit courts to provide uniformity of construction and application of these important statutes.

3. Does 42 U.S.C. 1981(b) and 29 U.S.C. 623(d) protection against retaliation extend only to employees' complaints about discrimination concerning promotions when they are clearly entitled to such promotion, or can prove that they were not promoted for unlawful discriminatory reasons?

The Fifth Circuit Court of Appeals Sanctioned Such A Departure by the District Court From The Accepted Course of Judicial Proceedings As To Call For An Exercise of This Court's Supervisory Power.

The plain language of 29 U.S.C. 623(d) prohibits an employer from retaliating against an employee because such individual has opposed any practice made unlawful by the Age Discrimination in Employment Act ("the ADEA"). That provision in pertinent part provides:

> It shall be unlawful for an employer to discriminate against any of his employees or applicants for employment . . . because such individual . . . has opposed any practice made unlawful by this section . . . 29 U.S.C. 623(d).

The Fifth Circuit by affirming the District Court's decision imposed a more stringent test for determining what is a "protected activity" or "oppositional behavior" to practices reasonably believed to be unlawfully discriminatory. The result is incongruous given the Fifth Circuit's decision in Long v. Eastfield College, 88 F.3d 300 (5th Cir. 1996). The First Circuit in Hochstadt v. Worcester Found. for Experimental Biology, Inc., 425 F.Supp.

318, 324 (D.C.Mass. 1976) aff'd, 545 F.2d 222 (1st Cir. 1976), noted that "opposed any practice made an unlawful employment practice" is very broadly construed.

Numerous decisions hold that the parallel anti-retaliation provision of Title VII and the ADEA are similar, and "cases interpreting the latter provision are frequently relied upon in interpreting the former." Shirley v. Chrysler First, Inc., 970 F.2d 39, 42 n. 5 (5th Cir. 1992). See also, Passer v. American Chemical Soc., 935 F.2d 322, 330 (D.C.Cir. 1991); Merrick v. Farmers Ins. Group, 892 F.2d 1434, 1441 (9th Cir. 1990). Those circuits that have considered ADEA retaliation claims have generally adopted the analysis used in Title VII cases without comment. Powell v. Rockwell Int'l Corp., 788 F.2d 279 (5th Cir. 1986).

The narrow construction of conduct or opposition in the decision below flouts the ADEA's prohibition of retaliatory conduct to ensure that employees are secure to pursue their claims of discrimination. Under the decision below, the anti-retaliation provision does not prevent the employer from taking adverse employment action against an employee who opposed not being promoted after he was informed he was "too old" or because "he had been around so long". This construction prevents consideration of the totality of the circumstances surrounding the retaliation. For example, instances where the person who made the adverse employment decision is also

involved in the underlying discrimination claim, and where the remarks are made in close proximity to the adverse action are ignored under this construction.

Limitations on the anti-retaliation provision should not be permitted to turn on whether the employee is clearly entitled to the promotion he seeks, or can prove unquestionably that he was previously passed over for promotion for unlawful discriminatory reasons. Instead, once the employee establishes that he reasonably believes he is opposing an unlawful refusal to promote him, he has engaged within "protected activity" and falls within the ambit of Section 623(d). The validity of a retaliation claim should not be evaluated on an underlying discrimination claim. The retaliation claim is distinct and independent. Proulx v. Citibank, N.A., 659 F.Supp. 972 (S.D.N.Y 1987) aff'd, 862 F.2d 304 (2nd Cir. 1988).

The Seventh Circuit rejected an overly strict interpretation of Title VII's anti-retaliation provision in McDonnell v. Cisneros, 84 F.3d 256, 262 (7th Cir. 1996). ("[p]assive opposition" is protected activity plainly covered by the anti-retaliation provision.)

The Sixth Circuit noted in EEOC v. Ohio Edison Co., 7 F.3d 541, 545 (6th Cir. 1993):

> [C]ourts have frequently applied the retaliation provisions of employment statutes to matters not expressly covered by the literal terms of these statutes where the policy be-

hind the statute supports a nonexclusive reading of the statutory language.

To avoid undercutting the purpose of the anti-retaliation provision of Section 623(d) and aid in the enforcement of this important provision, Section 623(d) must be construed to cover claims of retaliation if the employee has a reasonable belief that he has opposed some employment practice made unlawful by the ADEA. A retaliation claim should not depend on whether the underlying discrimination claim is proved. The retaliation claim is distinct from any underlying claims, such as discriminatory failure to promote or discriminatory discharge.

At least two circuits have recognized that plaintiffs are not required to have proved underlying discrimination claims and need only show that they were acting in "good faith" with a "reasonable belief" that a violation existed to assert a retaliation claim. See Sumner v. U.S. Postal Service, 899 F.2d 203, 209 (2d Cir. 1990) and Moyo v. Gomez, 32 F.3d 1382 (9th Cir. 1994).

The First Circuit requires only that a plaintiff show he had opposition to some honestly held, even if mistaken belief, that a discriminatory practice existed. Monteiro v. Poole Silver Co., 615 F.2d 4 (1st Cir. 1980).

Employees who have a reasonable belief that they have opposed an unlawful employment practice are in need of protection against

retaliation in response to such opposition. The purpose of the anti-retaliation provisions of Section 1981 and the ADEA is to give assurance to persons making claims of discrimination that they will not have action taken against them simply for engaging in such activity. In the decision below, the Fifth Circuit Court of Appeals sanctioned such a departure from the accepted course of judicial proceedings as to call for an exercise of this court's supervisory power.

CONCLUSION

42 U.S.C. Section 1981 is of great public importance but the Circuit Courts of Appeal are split in their holdings on the application of Section 1981(b) to claims of racial harrassment, retaliation, and discharge for conduct arising after the effective date of the Civil Rights Act of 1991. The decision below undercuts enforcement of Section 1981.

It is in the public interest for this Honorable Court to resolve that split to provide uniform construction and application of this important statute. Construing Section 1981(b) to make clear that employees may assert claims of harassment, retaliation, and discharge under Section 1981(b) for conduct arising after November 21, 1991 carries out the manifest Congressional purpose in amending Section 1981.

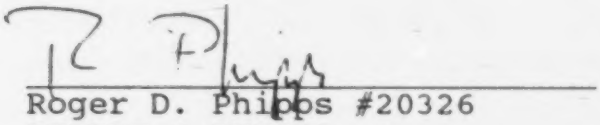
Likewise, the ADEA is a statute of great

public importance. The circuits are split on the meaning of "adverse employment action" with respect to retaliation claims brought under Section 1981 and the ADEA. Construing this term to mean only "ultimate employment decisions" overly restricts the anti-retaliation provisions of Section 1981 and the ADEA. Such a limitation runs counter to the Congressional intent in enacting these provisions and undercuts their enforcement. It is in public interest to resolve that split to provide uniform construction of these important statutes. The holding below is in the minority.

Lastly, the overly narrow interpretation of the term "protected activity" given in the decision below so conflicts with the accepted interpretation of this term as to require an excercise of this Honorable Court's supervisory powers to remedy this sanctioned departure from the usual course of judicial proceedings.

This Honorable Court should grant certiorari and reverse the holding below.

Respectfully submitted,



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CERTIFICATE

This is to certify that three copies of the Petition For Writ of Certiorari were personally hand delivered May 6, 1998 by me to opposing counsel, Mr. G. Phillip Shuler, III, Esq., and/or Ms. Julie D. Livaudais, Esq. at the offices of Chaffe McCall Phillips Toler & Sarpy, 2300 Energy Centre, New Orleans, LA 70163.

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No._____

In the Supreme Court of the United States

October Term, 1998

DR. CARL BERNOFSKY,
Petitioner,
v.

TULANE UNIVERSITY SCHOOL OF MEDICINE
(ADMINISTRATORS OF THE TULANE EDUCATIONAL FUND),
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Appendix to Petition for Writ of Certiorari

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 97-30575

CARL BERNOFSKY, Doctor
Plaintiff - Appellant

v.

TULANE UNIVERSITY MEDICAL CENTER, ET AL
Defendants

ADMINISTRATORS OF THE TULANE EDUCATIONAL FUND
Defendant - Appellee

Appeal from the United States District Court for the
Eastern District of Louisiana, New Orleans

ON PETITION FOR REHEARING

Before POLITZ, Chief Judge, HIGGINBOTHAM and DeMOSS, Circuit Judges. PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above case is (written) denied.

ENTERED FOR THE COURT:
(Signed) Politz
United States Circuit Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 97-30575

CARL BERNOFSKY, Dr.

Plaintiff - Appellant,

versus

TULANE UNIVERSITY MEDICAL CENTER, ET AL.,

Defendants,

ADMINISTRATORS OF THE TULANE EDUCATIONAL FUND,

Defendant - Appellee.

Appeal from the United States District Court for the
Eastern District of Louisiana, New Orleans
(96-CV-358-C)

Before POLITZ, Chief Judge, HIGGINBOTHAM and DeMOSS, Circuit Judges. PER CURIAM:*

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* Pursuant to 5TH CIR. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Dr. Carl Bernofsky appeals an adverse summary judgment in his action against Tulane University Medical Center, *et al.*, and Administrators of the Tulane Educational Fund, in which he asserts race and age discrimination and state law claims. Having considered the record, briefs, and oral arguments of counsel, and substantially for the reasons assigned and authorities cited by the district court in its comprehensive Order and Reasons signed and filed April 15, 1997, we AFFIRM.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

DR. CARL BERNOFSKY	CIVIL ACTION
VERSUS	NUMBER: 95-0358
TULANE UNIVERSITY MEDICAL SCHOOL, ET AL	SECTION: "C" 3

J U D G M E N T

In accordance with the court's order and reasons issued on April 15, 1997,

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of defendant, The Administrators of the Tulane Educational Fund, incorrectly designated in plaintiff's complaint as Tulane University Medical School, and against plaintiff, Dr. Carl Bernofsky, dismissing said plaintiff's complaint with prejudice.

New Orleans, Louisiana, this 21 day of April, 1997.

(Signed)
GINGER BERRIGAN
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

DR. CARL BERNOFSKY	CIVIL ACTION
VERSUS	NO. 95-358
TULANE UNIVERSITY MEDICAL SCHOOL	SECTION "C" (2)

ORDER AND REASONS

This matter comes before the Court on motion for summary judgment filed by the defendant, The Administrators of the Tulane Educational Fund ("Tulane"). Having considered the record, the memoranda of counsel and the law, the Court has determined that the motion should be granted for the following reasons.

The plaintiff, Carl Bernofsky, Ph.D. ("Bernofsky"), is a Jewish male who worked in the Biochemistry Department at Tulane's School of Medicine between 1975 and 1995, when he was terminated at the age of 61. Bernofsky filed this suit for race discrimination under 42 U.S.C. §1981 and age discrimination under the Age Discrimination in Employment Act, 29 U.S.C. §621 et seq ("ADEA") and La. Rev. Stat. 23:972, et seq. He has also alleged state law claims for breach of contract, detrimental reliance under La. Civ. Code art. 1967, conversion under La. Civ. Code art. 2315, retaliation for environmental reporting under La. Rev. Stat. 30:2027B, and wanton and/or reckless disregard relating to the storage, handling and transportation of hazardous material under La. Civ. Code art. 2315.3.

According to Bernofsky, at some time in 1977, he was told by the then Department chairman, Rune Stjernholm, Ph.D.

("Stjernholm"), that his position would be converted to a tenured position at Tulane upon the retirement of several tenured members of the department. The primary focus of the discrimination claims is James Karam, Ph.D. ("Karam"), who became Chairman of the Biochemistry Department at Tulane in November 1991 and who, according to Bernofsky, has a hatred for older Jewish professors whom he cannot control. Bernofsky claims that he requested tenure from Karam, was refused and that Karam harassed and interfered with him. Bernofsky claims that this interference in turn led to his inability to obtain grant funding and ultimate termination.

UNDISPUTED FACTS

Many of the material facts are undisputed. Bernofsky first joined the faculty in the Biochemistry Department in 1975 as a Visiting Associate Professor. In 1981, he was appointed as Research Associate Professor, and in 1983 he was named Research Professor. Bernofsky received written yearly appointments throughout his career at Tulane. He admitted in his deposition that he was advised when hired that his salary was to be paid out of research grants generated by him.

Under Tulane's rules in effect in 1975, Bernofsky's appointment was considered "special, does not provide tenure and is not regarded as probationary toward tenure." (Rec. Doc. 63, Exh. 29, p. 26). Those rules also provided that Tulane can convert a special appointment into a "regular" appointment, which can lead to permanent tenure. (Rec. Doc. 63, Exh. 29, p. 26).

Tulane's 1986 Faculty Handbook provides that the decision to terminate or convert a full time faculty appointment must be made

within the first seven years of full time special service at Tulane. With regard to the Medical School's Research Associate Professor position, the handbook provides:

> In view of the practices prevailing at many medical centers, the School of Medicine .... may continue to use the academic ranks in the titles designated for faculty members primarily engaged in research, e.g. Research Associate Professor. Service in such positions cannot lead to tenure. However, conversion from such a position to a regular full-time faculty appointment or vice versa, may be made, but only once and only within the first seven years of full-time service...

(Rec. Doc. 55, Exh. A, p. 7). Tulane's rules also provided that:

> The conditions of each appointment, including salary, rank, term of appointment, and tenure, shall be stated and confirmed to the faculty member in writing by the dean of the school or college. Any subsequent extensions or modifications of an appointment, and any special understandings, shall be stated and confirmed in writing by the dean of the school or college.

(Rec. Doc. 55, Exh. A, pp. 6-7).

The School of Medicine's Policy Statement defined these research faculty appointments as follows:

> Faculty primarily engaged in research may receive the usual rank of Instructor, Assistant Professor, Associate Professor of Professor with the prefix RESEARCH added to their title.

> These individuals may be appointed in a full-time non-tenure track position in both the basic and clinical science departments. These individuals are hired for research positions and do minimal teaching (e.g. 95% of their effort is devoted to research). (sic) and they are usually paid completely from research grants. The continuation of their annual appointment depends upon the availability of funds from extramural research grants. Research faculty are reviewed annually for their research productivity ... Depending upon the availability of research grant support, research track faculty should be given at least 6 months advance notice before termination.

(Rec. Doc. 55, Exh. B, p. 9).

Shortly after Karam took over the department in 1991, Bernofsky asked for tenure from Karam. The evidence reveals that in September 1993, Karam asked Dean James J. Corrigan, M.D. ("Corrigan") about Bernofsky's eligibility for tenure, and received the reply that he was not eligible for tenure or tenure track conversion under the above provisions. (Rec. Doc. 55, Exh. M). Bernofsky was formally advised of his ineligibility in May 1994 and again in August 1994. (Rec. Doc. 55, Exhs. E & O).

It is also undisputed that Bernofsky's grant funds for the years 1990-1995 fell far short of meeting his salary needs. The deficit was met with departmental funds. (Rec. Doc. 55, Exhs. U, V) .

In March 1994, Bernofsky's performance was evaluated by a Faculty Review Committee consisting of Stjernholm, Yu-Teh Li, Ph.D. and Richard H. Steele, Ph.D. The May 1994 evaluation

indicated a lack of success in obtaining research grants, a problem with the quality and quantity of research and publication, a lack of teaching duties and participation with others in the department. (Rec. Doc. 55, Exh. D). Karam recommended to Corrigan that Bernofsky's appointment for academic year 1994-1995 be renewed on condition that included undertaking teaching responsibilities in light of his lack of extramural research grant funding. (Rec. Doc. 55, Exh. E). It is undisputed that Bernofsky did not agree to teach. On August 9, 1994, Bernofsky received a six-month written notice of termination unless he could obtain research grant funding to support his salary. Such funding was not received. Tulane's deadline was extended to February 1995, at which time this suit was filed. Bernofsky was eventually terminated effective April 21, 1995. He filed a complaint with the EEOC after suit was filed. The Court's analysis of all the plaintiff's discrimination claims begins with appropriate recognition of certain other undisputed facts. First, Bernofsky admits in his deposition that he has no evidence of race-based discrimination against him before the arrival of Karam as department head.[1] (Depo. Bernofsky, Rec. Doc. 55, Exh. C, Vol. II,

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[1] The facts that Karam is 58 years old and of Lebanese ethnic background are deemed material. (Rec. Doc. 1, ¶ 20; PTO, Rec. Doc. 114, p. 13). The defendant claims as relevant the undisputed fact that Karam is married to a Jewish woman. The plaintiff claims that this fact is not significant because:

> All too often those who would discriminate against persons of a particular race only take aim at those persons who are their equals.
>
> In the case at hand, all of the senior Jewish Professors in the Biochemistry Department have been treated unfavorably by Dr. Karam in varying degrees. These three senior faculty members are his professional equals and function essentially independent of him. In contrast, Dr. Hyman, the recently hired faculty member is

pp. 29-31). He also admits in deposition that Karam was not "after" younger Jewish professors. (Rec. Doc. 55, Exh. C, Vol. II, p. 63). Also significant is the undisputed fact that Bernofsky admitted both that he was told when he was hired that his salary would be paid out of research grants and that he did not generate enough research funds to pay his salary in the years immediately preceding his termination. (Rec. Doc. 55, Exh. C, Vol. I, pp. 66, 206; Rec. Doc. 55, Exh. U). Finally, Bernofsky received written annual appointments every year he was at Tulane.

> dependent on Dr. Karam for departmental resources and thus poses no challenge to him. Similarly, Dr. Karam's wife, who is primarily a housewife, also is in a dependent relationship.

(Rec. Doc. 11, p. 11-12).

Similarly, counsel for the plaintiff has argued for the relevancy of discovery into the parentage of Karam's secretary, Carol Ulrich ("Ulrich"). He explained at her deposition:

> I believe that you come from a German background and I would like to investigate to find out whether or not there is any connection between the German state during the '40's and the '30's and the animus that I believe that you have toward Dr. Bernofsky. Now, I am going to go on.
>
> I am going to have to find out what your parents' parents' names were. I would like to find out what their name is because I am concerned that they may be immigrants to this country. If they are immigrants to this country, it is possible that they were survivors in Germany and they bare an animus towards (sic) Jew and that is what has brought you to the present situation where we finds ourselves today.

(Depo. Ulrich, Rec. Doc. 55, Exh. L, pp. 18-21).

DISCRIMINATION CLAIMS

Where the defendant has demonstrated the absence of a genuine issue of material fact, the plaintiff must go beyond the pleadings and designate specific facts showing the existence of a genuine issue of material fact for trial. Little v. Liquid Air Corp., 37 F.3d 1069 (5th Cir. 1994). Actual factual controversy is resolved in favor of the plaintiff, but no presumption is made that the plaintiff will prove necessary facts. Id. Metaphysical doubt, conclusory allegations, unsubstantiated assertions or a mere scintilla of evidence are not sufficient. Id.

The parties agree that the basic elements of a cause of action for intentional discrimination under 42 U.S.C. §1981, the ADEA and La. Rev. Stat. 23:972 mirror those applicable in Title VII cases. Woodhouse v. Magnolia Hospital, 92 F.3d 248 (5th Cir. 1996); Wallace v. Texas Tech University, 80 F.3d 1042 (5th Cir. 1996); Deloach v. Delchamps, Inc., 897 F.2d 815 (5th Cir. 1990). The applicable three-tier analysis first announced in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) sets forth the following framework: (1) the plaintiff must establish a prima facie case of employment discrimination; (2) the burden shifts to the defendant to produce a legitimate, nondiscriminatory reason for its actions; and (3) the burden returns to the plaintiff to prove that the reason was a pretext for discrimination and that the real reason was to discriminate. Polonco v. City of Austin, Tex., 78 F.3d 968 (5th Cir. 1996).

Once the plaintiff establishes the prima facie case by a preponderance of the evidence, the prima facie case raises an inference of unlawful discrimination. Of course, direct evidence of

discriminatory motive can also establish a prima facie case. Wallace, supra.

The burden of production then shifts to the defendant to proffer a legitimate, nondiscriminatory reason for the challenged employment action. This burden is met with evidence that if believed would support a finding that unlawful discrimination was not the cause of the employment action. If the defendant meets its burden, the presumption disappears and the prima facie case disappears. However, the plaintiff is allowed an opportunity to demonstrate that the defendant's articulated rationale is merely a pretext for discrimination. Such evidence of pretext will allow a fact finder to infer that the discrimination was intentional. Id.

In the end, to sustain a finding of discrimination, circumstantial evidence must allow a rational fact finder to make a reasonable inference that race or age was a determinative reason for the employment decision. At all times, the plaintiff retains the burden of persuading the fact finder that impermissible discrimination motivated the adverse employment decision. Stults v. Conoco Inc. 76 F.3d 651 (5th Cir. 1996).

A plaintiff can avoid summary judgment if the evidence, taken as a whole creates a fact issue as to whether the employer's stated reasons was not the motivation for the action or creates a reasonable inference that race or age was a determinative factor in the employment action. Rhodes v. Guiberson Oil Tools, 75 F.3d 989 (5th Cir. 1996) (en banc); Grimes v. Texas Dent. of Mental Health & Mental Retardation, 102 F.3d 137 (5th Cir. 1996). The plaintiff must present evidence sufficient to create a reasonable inference of

discriminatory intent. Id.; LaPierre v. Benson Nissan, Inc., 86 F.3d 444 (5th Cir. 1996).

Here, the plaintiff's discrimination claim has changed over time. When this motion was filed, the plaintiff argued and testified that he was discriminated on the combined bases of his race and age.[2] Specifically, Bernofsky argued that Tulane discriminated against him based on his status as an "older nontenured Jewish professor."[3] Subsequent to the filing of papers in conjunction with this motion but prior to the first trial setting, Bernofsky abandoned the subgroup of older Jewish professors in favor of independent theories of race[4]

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[2] Tulane concedes that Bernofsky is both Jewish and over 40 years old.

[3] The Court could not locate any authority for recognition of "older Jews" as a subgroup protected by §1981 and the ADEA. However, the Court's research revealed a compelling support for nonrecognition of such an "age-plus" subgroup. The Fifth Circuit has recognized "sex-plus" discrimination within the confines of Title VII. Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971); Jeffries v. Harris County Community Action Assn., 615 F.2d 1025 (5th Cir. 1980). See also: Lam v. University of Hawaii, 40 F.3d 15551 (9th Cir. 1994). However, no case has recognized the subgroup of older Jews or combined claims brought under §1981 and the ADEA, and the caselaw does not lend its support to such recognition. Luce v. Dalton, 166 F.R.D. (S.D.Cal. 1996). Even assuming the existence of the protected subgroup of "older Jews," Bernofsky cannot prove his claims of discrimination for the same underlying reasons that plague his current claims.

[4] Section 1981 protects against only race discrimination. Specifically, Section 1981 provides in pertinent part as follows:

All persons within the jurisdiction of the United

and age discrimination.[5] (Rec. Doc. 119). The Court permitted the change in claims despite their timing and the prejudice to Tulane. However; the Court ordered that the trial be continued and that a new and revised pre-trial order be submitted which reflects the precise claims that are being made prior to ruling on this motion. It is these claims listed in the pre-trial order which the Court is considering on this motion[6]. (PTO; Rec. Doc. 114, pp. 2-7).

In his original opposition, Bernofsky specifies his discrimination claims "with respect to his denial of tenure, retaliation against him as a result of his request that his name be recommended for conversion with an immediate appointment of tenure, and his

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> States shall have the same right in every State and Territory to make and enforce contracts ... and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens...

[5] The ADEA, 29 U.S.C. §623, protects against only age discrimination and provides in relevant part as follows:

> It shall be unlawful for an employer --
>
> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age...

[6] The Court is compelled to note that after painstaking effort, it is unable to locate sufficient factual support for much of the enormous volume of material factual allegations contained in his oppositions and in the pre-trial order, especially in the plaintiff's lengthy appendix to his brief summary of material facts located at the end of the pre-trial order. The plaintiff's difficulties with the facts contribute to many of the deficiencies the Court finds in his claims.

discharge." (Rec. Doc. 63, p. 14). In the pretrial order, he claims that his §1981 claims are based on failure to promote/denial of tenure, retaliation/harassment/interference during employment and discharge. He claims that his ADEA claims are for retaliatory discharge and discriminatory discharge. (Rec. Doc. 114, p. 2). Tulane denies these allegations in the pre-trial order and contends in this motion that Bernofsky is unable to make a prima facie case of racial or age discrimination because he cannot present proof that he was qualified or that he received less favorable treatment than a similarly qualified person outside of the protected class. Tulane further argues that Bernofsky's termination was based on legitimate and nondiscriminatory reasons which are not pretextual. Specifically, Tulane argues that Bernofsky was not qualified for tenure and was not qualified as a Research Professor due to his inability to obtain sufficient grant funding.[7] The Court agrees.

The plaintiff's §1981 claims immediately face some formidable procedural problems. The right to make contracts under §1981 does not protect the employee from any conduct by the employer after the contractual relationship has begun; the right to enforce contracts under §1981 involves the right of access to legal process. Patterson v. McLean Credit Union, 491 U.S. 164 (1989); Carter v. South Central Bell, 912 F.2d 832 (5th Cir. 1990), cert. denied, 501 U.S. 1260 (1991). The Supreme Court has specifically held that §1981 does not recognize claims for racial harassment.[8]8

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[7] The Court does not address Tulane's arguments that Bernofsky did not adequately publish and was not collegial.

[8] The elements for a claim under §1981 for retaliation were the same, when such a cause of action was recognized prior to Patterson, supra. See: Goff v. Continental Oil

Patterson, supra. With regard to Bernofsky~s discriminatory discharge claim, Section 1981 does not extend to discriminatory discharge claims or retaliatory discharge claims. Carter, supra. However, even assuming that these procedural bars do not exist, the plaintiff faces equally serious problems with the undisputed facts.

Denial of Tenure

Assuming Bernofsky's §1981 claim for the denial of tenure is procedurally viable, in order to establish a prima facie case of discrimination for failure to promote, the plaintiff must show: (1) that he is a member of a protected class; (2) that he sought and was qualified for an available employment position; (3) that he was rejected for that position; and (4) that the employer continued to seek applicants with the plaintiff's qualifications. Grimes, supra.

Here, the undisputed facts indicate that Tulane's policy handbook provides that conversion to tenure track must occur within the first seven years of full time employment at Tulane and the Bernofsky did not meet this requirement in 1989, when he claims that Stjernholm promised[9] him that he would be tenured or after Karam became Chairman of the Biochemistry Department in 1991.

Co., 678 F.2d 593 (5th Cir. 1982).

[9] The Court notes that Bernofsky alternatively characterizes Stjernholm's statements as a "promise" and a "recommendation." Of course, the difference in the characterization could be critical to his entitlement, but is of no moment here given Bernofsky's understanding of how tenure is given at Tulane and the fact that Bernofsky is unable to present proof that Stjernholm's promise or recommendation could have resulted in the actual grant of tenure.

Despite Bernofsky's suggestions to the contrary, he simply does not have any proof to support his assumption that a single person could promise or award tenure at Tulane, nor does he have written proof that tenure was promised to him by any person or persons at Tulane with appropriate authority to make that promise. The mere fact that Karam was of Lebanese lineage and the plaintiff Jewish is insufficient proof of discriminatory intent.

Instead, Bernofsky's proof of discrimination in denial of tenure surrounds the fact that another professor, Jen-Sie Tou, Ph.D. ("Tou"), was converted to a tenured position despite the written requirements in 1989, before Karam became chairman. Essentially, the plaintiff argues that if an exception to Tulane's requirements had been made for Tou in 1989, an exception should have been made for Bernofsky and therefore that the failure to do so must have been racial discrimination. He also argues that he should have been told that Stjernholm recommended that he be considered for tenure at the same time as Tou in 1989 and that tenure was wrongfully withheld because he was not so informed. Assuming that Bernofsky was otherwise qualified for an "exception" and could make a prima facie case, the Court finds that Tulane has presented undisputed proof that unlawful discrimination was not the cause of the granting the exception to Tou and not Bernofsky. It is undisputed that Tou had previously served as a tenure-track professor from 1972 to 1980 at which time her appointment was converted to a research professorship. Tou's situation is distinguishable because she was on a tenure track for a number of years prior to her conversion. Bernofsky was never on a tenure track. Of course, Karam was not at Tulane until 1991 and the plaintiff admits that he lacks any evidence of discrimination at the time Tou was converted and Bernofsky was not. To establish pretext, the plaintiff must show that the proffered

reason was false and that unlawful discrimination was the real reason. Barrow, 10 F.3d at 2998, fn 22. Here, Bernofsky cannot show that he was qualified for tenure and can offer nothing that suggests that Tulane's failure to make an "exception" for him was discriminatorily motivated or that Tulane's rationale is merely a pretext for discrimination.

Bernofsky also argues that he was already tenured under the terms of his contract with Tulane, although this argument ignores his subsequent alleged repeated requests to be considered for tenure. He also argues that he had been told by Karam that he had "de facto tenure." Assuming this comment was made, the undisputed facts still clearly establish that "de facto tenure" does not exist at Tulane, Bernofsky knew that "de facto tenure" did not exist and kept asking for "real" tenure and that Karam did not promise Bernofsky that he would receive "real" tenure. Rather, the undisputed facts indicate that Karam responded to Bernofsky's requests for tenure with written inquiry, was advised that Bernofsky was not eligible for tenure and so advised the plaintiff. In sum, while Bernofsky's claims involving tenure rely on conflicting versions of fact, all those facts and their attendant conflict have been supplied by Bernofsky alone. Therefore, the plaintiff is left with insufficient proof either that he had tenure or that he was discriminatorily denied tenure at Tulane.

Retaliation, Harassment, Interference and Retaliatory Discharge

In order to establish a prima facie claim for retaliation, the plaintiff must establish: (1) the plaintiff engaged in protected activity; (2) an adverse employment action occurred; and (3) there was a causal connection between the participation in the protected activity and the adverse employment action. Holt v. JTM Industries,

Inc. 89 F.3d 1224 (5th Cir. 1996). An employee has engaged in protected activity if he has either (1) opposed any practice made an unlawful employment practice or (2) made a charge, testified, assisted or participated in any manner in an investigation, proceeding or hearing under the statute. Grimes, suora; Long v. Eastfield College, 88 F.3d 300 (5th Cir. 1996). The plaintiff must show that he had at least a reasonable belief that the opposed practices were unlawful. Long, supra. The elements for a claim of retaliation are the same under the ADEA and Title VII; cases under each frequently rely upon cases interpreting the other. Holt; Barrow v. New Orleans S. S. Assn., 10 F.3d 292 (5th Cir. 1994).

Bernofsky's claim for racial discrimination under §1981 involves alleged retaliation, harassment and interference from Karam which allegedly began, according to the pre-trial order, when Bernofsky requested from Karam the tenure allegedly "promised" by Stjernholm. The pre-trial order also indicates that Bernofsky has also made a claim for retaliatory discharge under the ADEA, apparently relying on the same facts. The plaintiff claims that his research efforts were hampered until he lost funding, and that he was evaluated in peer review improperly and discriminatorily. In the pre-trial order, Bernofsky alleges that Tulane imposed a condition that he secure grant funding as a result of the discriminatory peer review, despite the fact that he previously admitted in deposition that he understood from the beginning that his employment at Tulane required that he obtain funding. Tulane responds that Bernofsky was not eligible for tenure, that he was unable to get adequate grant funding to support his salary and that he did not take on additional departmental responsibilities to make up for the shortfall.

Substantial legal hurdles face the plaintiff's claims of retaliation. First, with regard to any claim under §1981 for racial retaliation, there is no material fact among the battalion of allegations and facts recited by the plaintiff to suggest that any of the allegedly discriminatory conduct carries with it the degree of consequence required of an "adverse employment action." Mattern v. Eastman Kodak Co., 104 F.3d 702 (5th Cir. 1997). In Mattern, the Fifth Circuit held that the definition of "adverse employment action" for retaliation claims under Title VII does not include action that has "mere tangential effect on a possible future ultimate employment decision" such as disciplinary action, reprimand, or even poor performance, or "anything which might jeopardize employment in the future." Mattern, 104 F.3d at 708.

In addition, it must be noted that the Fifth Circuit has recognized the necessity of peer-review evaluation techniques in the university context. Gottlieb v. Tulane University of La., 809 F.2d 278 (5th Cir. 1987). In any event, Bernofsky cannot present proof that any of this alleged negative treatment and peer review was discriminatorily tainted. Again, the facts that the plaintiff was Jewish and 61 satisfy one element of the prima facie case; they are insufficient to carry the entire burden on summary judgment.

While the plaintiff's ADEA claim for retaliatory discharge involves an adverse employment action, it suffers from a second defect underlying all of the claims of retaliation: the absence of "protected activity." Bernofsky chose to file a complaint with the EEOC after suit was filed. By Bernofsky's own admission, he was not shy about complaining at work. However, he cannot show that at any time he made a complaint of racial or age discrimination with Tulane or opposed any practice made an unlawful employment

practice at any earlier time that could constitute qualifying protected activity.

Any action resulting from his demands for tenure from Karam also fall due to the lack of proof that such tenure was owed Bernofsky or denied due to improper racial or age considerations. In any event, the Court finds that Bernofsky's demand for tenure as allegedly promised by Tulane does not constitute a protected activity under the undisputed facts presented. In addition, all claims for retaliation under §1981 and the ADEA suffer for lack of causal connection between any allegedly protected activity and adverse employment action. Finally, Bernofsky cannot establish that Tulane's explanation for the challenged activity was pretextual and has not offered proof that their explanation was false and that discrimination was the real reason. Barrow, supra.[10]

Discriminatory Discharge

The plaintiff establishes a prima facie case of discriminatory discharge when he shows that: (1) he was discharged; (2) he was qualified for the position; (3) he was within the protected class at the time of the employment action; and (4) he was either replaced by someone outside the protected class or otherwise discharged because

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[10] Bernofsky argues for the relevance of the comment from a tenured professor, Dr. Melanie Ehrlich, that she did not get along with Karam and that it "may well [have] a Jewish component." (Rec. Doc. 114, p. 5). The Court finds that this, along with Bernofsky's unsubstantiated impressions that other Jewish professors were also discriminatorily treated by Karam, are insufficient to avoid summary judgment.

of his race or age. Rhodes, supra.[11] Again, Tulane argues that Bernofsky was not qualified because of his lack of extramural funding and that other Jewish and older persons were hired or retained in the department during Karam's chairmanship.

The plaintiff's primary proof with regard to his discharge involves the retention of Dr. Su-Chen Li ("Li"), wife of Dr. Yu-Teh Li. The plaintiff argues that Li does not have any grant funding "in her own right." (Rec. Doc. 114, p. 4). However, it is undisputed that 100% of Li's salary was paid through extramural funding between 1988-1991, and from 1991 to the present, only 25% of Li's salary is paid with departmental funds; these funds come from grants awarded to her husband. By contrast, Dr. Bernofsky acknowledges that he was paid in substantial part with departmental funds, estimated at 70% by Bernofsky himself; it is undisputed that no one else at Tulane contributed to the payment of his salary.[12] (Rec. Doc. 114,

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[11] In the ADEA context, the Fifth Circuit has recognized an appropriate fourth element where the employer does not plan to replace the discharged employee is whether others who were not members of the protected class remained in similar positions. Meinecke v. H & R Block of Houston, 66 F.3d 77, 83 (5th Cir. 1995). Also, the United States Supreme Court recently held that "the fact that a replacement is substantially younger than the plaintiff is a far more reliable indicator of age discrimination than is the fact that the plaintiff was replaced by someone outside the protected class." O'Connor v. Consolidated Coin Caterers Corp., 116 S.Ct. 1307, 1310 (1996).

[12] Bernofsky argues as relevant the fact that he paid for his research assistants from his grant funds. However, Bernofsky has made Li the focus of his argument that she was less qualified and allegedly more favorably treated by Tulane when she was retained. Bernofsky's focus and comparison is not on Li's husband. In any event, this argument does not change the

pp. 8 & 14A). It is also undisputed that Li teaches courses and participates in departmental committee activities and that Bernofsky has not taught since 1992 nor served on a committee since 1993. In fact, Bernofsky specifically rejected an identical offer by Tulane to take on teaching duties in order to remain at Tulane. Again, Bernofsky does not establish that the lack of funding was false or that unlawful discrimination caused his termination. Barrow.

STATE CLAIMS[13]

Breach of Contract and Detrimental Reliance

The first two state claims made by Bernofsky pertain to his alleged tenure and/or promise of tenure. These claims relate to the alleged promise made by Stjernholm in 1977 and Karam's alleged statement of "de facto tenure." According to the pretrial order, Bernofsky claims both that he was in fact tenured by virtue of these alleged "promises" when he was terminated and that, although he was not tenured at the time of his termination, he detrimentally relied on the promises of Stjernholm and Karam. The conflicting nature of Bernofsky's own actions is reflected in the undisputed facts. These

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undisputed fact that he did not find non-departmental funds sufficient to cover his own salary.

[13] Because the issues pertaining to the viability of the state law claims have been fully briefed, the Court finds that judicial economy, convenience, fairness and comity weigh in favor of exercising jurisdiction over these remaining claims. Metropolitan Wholesale Supply Inc. v. M/V ROYAL RAINBOW, 12 F. 3d 58 (5th Cir. 1994).

undisputed facts both explain why his theories of recovery are inconsistent and undermine them.

Bernofsky claims support from the fact that Stjernholm unsuccessfully recommended that Bernofsky be considered for tenure in 1989. This fact recognizes the underlying truth that no one person can promise or grant tenure at Tulane and that the "promise" of the department head is insufficient in itself to grant tenure. The fact that Bernofsky alleges that he continually asked about being considered for tenure, as recently as 1994, establishes that he knew he was not tenure-track or tenured and that he knew the procedure set forth by Tulane for tenure.[14] The undisputed facts show that Bernofsky received annual written appointments, consistent with his non-tenured status in accordance with Tulane's rules, and that his continued ineligibility was confirmed by Dean Corrigan in writing in 1994.

With regard to Bernofsky's contract claim that he was tenured at the time of his termination, the undisputed fact is that Bernofsky did not receive tenure or become eligible for tenure track by the appropriate authorities at Tulane at any time. The Court unhesitantly concludes that Bernofsky has no proof that he was actually granted

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[14] The Court specifically finds that any alleged written statement made by Department personnel to third parties regarding Bernofsky's possible consideration for future tenure is insufficient as a matter of law to create a genuine dispute of material fact regarding Bernofsky's contractual entitlement to tenure and cannot be reasonably relied upon in light of Bernofsky's admitted actions which so clearly indicate a very clear understanding of his employment status at Tulane.

tenure-track status or tenure by Tulane sufficient to avoid summary judgment. Celotex Corp. v. Catrett, 477 U.S. 317 (1986).[15]

The undisputed facts undermine Bernofsky's claim of detrimental reliance under La. Civ. Code art. 1967 as well.[16] In order to establish a claim of detrimental reliance under Louisiana law, the plaintiff must prove: (1) that Tulane made a representation; (2) that Bernofsky justifiably relied on that representation; and (3) that Bernofsky changed his position to his detriment because of that reliance. Levinson v. Charbonnet, 977 F.2d 930 (5th Cir. 1992).

With regard to the first element, Bernofsky may face a serious procedural impediment with regard to the alleged representation made by Stjernholm in 1977. As the Louisiana Supreme Court held in Morris v. Friedman, 663 So.2d 19 (La. 1995), Article 1967 may not apply retroactively to an alleged promise made before its effective date in 1985. Again, with regard to the

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[15] Of course, the contract claim also suffers from the legal deficiency that if Bernofsky's agreement with Tulane was for a length of time beyond Tulane's written one-year commitments, it would be construed as a contract for an indefinite period of time which is terminable at the will of either party. See: Gilbert v. Tulane University, 909 F.2d 124 (5th Cir. 1990); La. Civ. Code. art. 1778.

[16] Article 1967 provides:

> Cause is the reason why a party obligates himself.
>
> A party may be obligated by a promise when he knew or should have known that the promise would induce the other party to rely on it to his detriment and the other party was reasonable in so relying. Recovery may be limited to the expenses incurred or the damages suffered as a result of the promisee's reliance on the promise. Reliance on a gratuitous promise made without required formalities is not reasonable.

representation allegedly made by Karam, the Court finds that the alleged "de facto" characterization actually indicates the lack of "true" tenure.

In any event, Bernofsky cannot establish either that he actually relied upon either representation or that his reliance was reasonable. Again and by his own admission, Bernofsky continued to ask to be considered for tenure which undisputedly erases the possibility of genuine dispute as to his actual reliance. This fact is affirmatively established by Tulane's consistent treatment and annual written confirmation to Bernofsky of his non-tenured status.

Further, the Court finds that these undisputed facts equally undermine any genuine claim of justified reliance. Bernofsky is a highly educated man who understood and acted on the rules governing consideration for tenure. The alleged representations upon which Bernofsky allegedly justifiably relied were, at best, encouraging communications from two individuals that would be a necessary prelude before one was seriously considered for tenure by the larger governing bodies at Tulane. Bernofsky's current self-serving and conflicting allegations and statements cannot rescue him from the undisputed facts that Bernofsky's consideration for tenure was, at best, restricted to such isolated remarks. The Court finds that these statements could easily be recognized for what they were and that they were, in fact, recognized as such by Bernofsky at the time they were made.

Conversion

Conversion is an act in derogation of the plaintiff's possessory rights or any wrongful exercise or assumption of

authority over another's goods, depriving him of permanent or indefinite possession. Chrysler Credit Corp. v. Whitney National Bank, 51 F.3d 553 (5th Cir. 1995). It is the commission of a wrongful act of dominion over the property of another in denial of or inconsistent with the owner's rights. Junior Money Bags, Ltd. v. Segal, 970 F.2d 1 (5th Cir. 1992). In order to prevail on a claim of conversion under Louisiana law, the plaintiff must prove that (1) he owned or had the right to possess; (2) the defendant's use was inconsistent with the plaintiff's right of ownership; and (3) the defendant's use constituted a wrongful taking. Chrysler Credit Corp. v. Whitney National Bank, 798 F.Supp. 1234 (E.D. La. 1992).

The pre-trial order does not shed light on the precise objects of Bernofsky's claim for conversion. In his first opposition to Tulane's motion, he identified "equipment and last paycheck" as the items allegedly converted by Tulane. (Rec. Doc. 63, p. 45). In that opposition, Bernofsky relies on the allegations of his complaint in support of this claim. Id. Tulane's specifically requested identification and proof of ownership. (Rec. Doc. 67, p. 8-9). In response, Bernofsky offers the lone testimony of Stjernholm that Bernofsky brought certain equipment with him when he began at Tulane, yet makes no statement identifying what equipment he is claiming ownership. (Rec. Doc. 70, pp. 17-19). In yet a subsequent reply memorandum, Bernofsky cites law indicating less than an ownership interest may sometimes be sufficient to support conversion, and reiterates his general allegation that he owned unspecified equipment and has proof, although he chose not to identify and produce evidence of his ownership interest. (Rec. Doc. 104, p. 9). Bernofsky has been given ample opportunity to present the proof that Celotex, supra, requires of a plaintiff seeking to avoid summary judgment.

The fact that this suit had been filed at the time Bernofsky was terminated also works against Bernofsky on this claim. Counsel for Bernofsky advised the Court of his claimed entitlement to equipment at that time. Identification and proof was requested by Tulane during those early months of this lawsuit. The Court finds that this lack of proof is no accident and Bernofsky's failure to produce any proof relating to ownership is not inadvertent. Summary judgment on this issue is warranted.

Retaliation under La. Rev. Stat. 30:2027

Bernofsky's final two claims concern a complaint to Tulane in 1992 regarding an incident of flooding in his laboratory. In the pre-trial order, Bernofsky claims that animal hair, blood and unidentified chemicals were involved in the lab flood. He eventually filed a grievance for flood damage to his laboratory equipment with Tulane. In opposition, Bernofsky admits that his "grievance sought a resolution to a very specific problem, damaged equipment ... however, the larger issue of flooding of waste matter ... was a problem requiring action by Tulane's administration." (Rec. Doc. 70, p. 15). He claims that his "specific complaint seeking repair of critically necessary equipment in no way diminishes the fact that he also made a complaint about an environmental problem and was retaliated against by his employer." (Rec. Doc. 70, p. 16).

Under La. Rev. Stat. 30:2027A:

> No firm, business, private or public corporation, partnership, individual employer, federal, state, or local governmental agency shall act in a retaliatory manner against an employer, acting in good faith, who reports or complains about possible environmental violations.

The Court was unable to locate much reported caselaw on this statute. However, it finds that Bernofsky is unable to present proof adequate to show the requisite environmental violation or the connection between any complaint and subsequent retaliation. No reference is made to a specific statute or regulation which would constitute the alleged environmental violation. All the proof indicates that his complaint was of a monetary nature, seeking compensation for damage to his laboratory equipment without concern for environmental impact. Finally, a report made within the reach of this statute does not serve as life-long immunity from negative employment action. In any event, there is no evidence to suggest that Bernofsky's termination was in any way connected to his complaint about flooding rather than his inability to meet his salary needs with extramural monies. This Court is unwilling and unable to be the first to stretch this statute to include a cause of action based on these undisputed facts.

La. Civ. Code art. 2315.3

Finally, Bernofsky has alleged a violation of now-repealed Article 2315.3 in the pre-trial order, apparently based on the 1992 flooding incident in his laboratory at Tulane. That article provides in pertinent part as follows:

> In addition to general and special damages, exemplary damages may be awarded, if it is proved that plaintiff's injuries were caused by the defendant's wanton or reckless disregard for public safety in the storage, handling, or transportation of hazardous or toxic substances.

This article does not relieve the plaintiff of proving the basic factual elements of a tort case; it imposes a more onerous proof requirement. Billiot v. B. P. Oil Co., 645 So.2d 604 (La. 1994). In order to prove entitlement to punitive damages under Article 2315.3, the plaintiff must prove: (1) the defendant's conduct was wanton or reckless; (2) the danger created by the defendant's wanton or reckless conduct threatened or endangered the public safety; (3) the defendant's wanton or reckless conduct occurred in the storage, handling or transportation of hazardous or toxic substances; and (4) the plaintiff's injury was caused by the defendant's wanton or reckless conduct. Id.

Any claim under this article fails for several reasons. First, the plaintiff offers nothing in response to Tulane's argument that any claim has prescribed under the one-year prescriptive period set forth in La. Civ. Code art. 3492. Even assuming that this claim has not prescribed, however, the plaintiff has not presented proof: (1) that any substance associated with the flood was hazardous or toxic; (2) that Tulane "engaged in" the storage, handling or transportation of hazardous or toxic substances; (3) that plaintiff was injured as a result of Tulane's allegedly mishandling of any allegedly hazardous or toxic substance; (4) that Tulane acted wantonly or recklessly; or (5) that Tulane's alleged misconduct threatened the public safety. See: Strauch v. Gates Rubber Co., 879 F.2d 1282 (5th Cir. 1989), cert. denied, 493 U.S. 1045 (1990); Anderson v. T & D Machine Handling, Inc., 1996 WL 518138 (E.D.La. 1996).

Bernofsky, who began this litigation alleging that he was wrongfully terminated based on his status as an older Jewish professor, finishes with a claim that alleges that he was terminated as a result of reporting a flood in his laboratory in 1992. Again, all undisputed facts support the simple explanation that Bernofsky was

terminated for his inability to meet his salary needs as required of a Research Professor in the School of Medicine.

Accordingly,

IT IS ORDERED that the defendants' motion for summary judgment be and hereby is GRANTED. Judgment shall be entered in favor of defendant and against the plaintiff, dismissing all of the plaintiff's claims with prejudice.

New Orleans, Louisiana, this 15 day of April, 1997.

(Signed) Ginger Berrigan
UNITED STATES DISTRICT JUDGE